

NO. 48907-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DENNIS J.W. FISHER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00367-3

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the record is sufficient to review Fisher's claim of ineffective assistance of counsel for failure to move to suppress evidence when the privilege to suppress evidence was waived and there was no hearing or opportunity to develop the record?

II. STATEMENT OF THE CASE

On Oct. 13, 2013, at about 9:11 p.m., Forks Police Officer Julie Goode encountered Fisher driving a black SUV after a disturbance was reported over dispatch. RP 97. The Statement of Probable Cause by Goode set forth reasons for why she detained Fisher. CP 97–99. Goode was given a description of the disturbance in progress whereby the reporting party stated that Fisher had kicked in her bedroom door and was leaving in a black colored SUV. RP 97. Goode recognized the SUV and Fisher due to prior contacts. RP 97.

Goode detained Fisher and patted him down during a safety frisk and found heroin and a large amount of cash. RP 97. Goode arrested Fisher and then searched his vehicle pursuant to a search warrant and found a 9mm firearm (RP 97–98).

On Oct. 16, 2015, the State filed an information charging Dennis Fisher with the crimes of Residential Burglary and Possession of a Controlled

Substance, Heroin. CP 93. On Mar. 28th the trial court granted the State's motion to dismiss the charge of Residential Burglary. CP 69, 68.

On Mar. 29, 2015, the parties discussed the dismissal of Residential Burglary and the agreement of the parties that the facts of the Residential Burglary count would not be used at trial. RP 12. In particular the State's counsel informed the trial court that the parties agreed that "It will just be just when Officer Goode detained Mr. Fisher. She will not say for what reason and then searched him. That would be how we'd be going about the questioning for the possession." RP 13.

The trial court also addressed Motions in Limine where the subject was brought up again. RP 16. The court asked if the defense had any Motions in Limine and the defense answered, "Other than keeping out everything that doesn't have to do with the possession of heroin and the money, I don't think I have any." RP 16. There was to be no mention of the action that brought about Mr. Fisher's arrest other than to say that he was detained and searched. RP 16.

The case went to trial before a jury on Mar. 29, 2015. RP 10, 117. During the trial, the State's counsel called Forks Police Officer Julie Goode to the stand on direct examination. RP 119. Goode was on duty in Forks Washington on Oct. 13, 2015 around 9:00 p.m. when she encountered Fisher. RP 121. Goode testified that she detained Fisher that evening but the

questioning did not elicit why she detained Fischer. RP 119–49. As for the Probable Cause statement, Officer Goode testified that she does not include all of the facts from the full case report and she abbreviates what facts to include in a Probable Cause statement. RP 141.

On cross examination, the agreement to not discuss the Residential Burglary or firearm per Motion in Limine was brought to light again when defense counsel offered Officer Goode’s Probable Cause Statement (CP 97–99) as evidence to impeach Officer Goode. RP 144–46.

Fischer stated in his briefing that “It is not clear from [Officer Goode’s] testimony whether she felt the “bulge” during the weapons search or merely saw the bulge in his pants.” Appellant’s Br. at 7.

III. ARGUMENT

A. FISHER FAILED TO ESTABLISHED MANIFEST ERROR BECAUSE THE RECORD IS INSUFFICIENT TO REVIEW THE APPELLANT’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE ISSUE WAS NOT RAISED BEFORE OR DURING TRIAL.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right”. RAP 2.5(a)(3); *State v. Scott*, 110 Wash.2d 682, 686–87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wash.App. 339, 342, 835 P.2d 251 (1992).

State v. McFarland, 127 Wash.2d 322, 332–33, 899 P.2d 1251 (1995).

“If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.* at 31 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

There was no motion to suppress evidence and was no hearing to develop the facts and record which may or may not have show justification for the safety frisk at issue. The record shows that the validity of the frisk and obtaining the evidence of heroin were not at issue in the trial or preliminary motions. In fact, this information was kept out by Motion in Limine to prevent the mention of any details surrounding the reasons for the stop.

Fisher cites to only the Probable Cause Statement (CP 97–99) as a full account of the facts known to Officer Goode at the time of the frisk. However, Goode testified that she abbreviates the probable cause statement and does not include all known facts, some of which might establish a danger above and beyond that which was established in the probable cause statement.

The Statement of Probable Cause does not report details which may have been reported by dispatch and or which may have been known to Officer Goode personally based on her prior contacts with Fisher. CP 97. Goode also did not mention whether she knew at the time of the stop that Fisher was a convicted felon or what his convictions consisted of.

“[When] combined with other circumstances that contribute to a reasonable safety concern, such information could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others.” *State v. Collins*, 121 Wn.2d 168, 177, 847 P.2d 919 (1993).

Additionally, although the probable cause statement and testimony show that Goode lifted the shirt to verify that the large bulge in Fisher’s pocket was not a weapon or dangerous object we don’t know whether Goode saw the heroin in plain view once the shirt was lifted. If an officer who has validly reached into the clothing of a suspect, in search of weapon, feels an item of questionable identity that has size and density such that it might or might not be weapon, officer may only take such action as is necessary to examine object to verify if it is weapon. *State v. Hudson*, 124 Wn.2d 107, 874 P.2d 160 (1994).

“The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below.” *McFarland*, 127 Wn.2d at 336.

IV. CONCLUSION

The record is insufficient to determine whether the safety frisk and seizure of heroin were valid. Therefore, Fisher cannot show manifest error

and the Court should decline to review this claim for the first time on appeal.

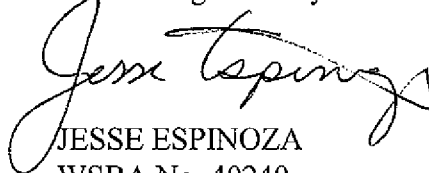
A personal restraint petition is the more appropriate avenue for this claim.

McFarland, at 339

Respectfully submitted this 28th day of November, 2016,

MARK B. NICHOLS

Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Jesse Espinoza", written over the printed name.

JESSE ESPINOZA

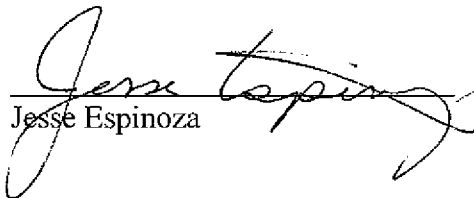
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Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Peter B. Tiller on November 28, 2016.

MARK B. NICHOLS, Prosecutor

A handwritten signature in black ink, appearing to read "Jesse Espinoza", written over the printed name.

Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

November 28, 2016 - 5:14 PM

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